Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Terrance J. Pitts,
Petitioner

v.

Dallas County Bail Bond Board

On Petition For Writ Of Certiorari To The Supreme Court of Texas

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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EXHIBIT A

The State of Texas

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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September 28, 2000

Ms. Carolyn Findley Price
417 Williams Street
Arlington, TX 76010

Mr. John Clark Long, IV
Office of the Dallas County District Attorney
411 Elm Street, 5th Floor
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RE: Case Number 00-0751
Court of Appeals Number: 07-99-00222-CV
Trial Court Number: 96-12507-F
Style: TERRANCE J. PITTS
V.
DALLAS COUNTY BAIL BOND BOARD

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,
John T. Adams, Clerk

by *s/ Gena Pelman*
Gena Pelman, Deputy Clerk

cc: Ms. Peggy Culp, Clerk
Mr. Jim Hamlin

EXHIBIT B

Terrance J. Pitts, Appellant	§	From the 116th District Court
	§	of Dallas County
v. No. 07-99-0222-CV	§	March 15, 2000
Dallas County Bail Bond Board Appellee	§	Opinion by Chief Justice Boyd

JUDGMENT

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed that the judgment of the trial court be in all things affirmed.

It is further ordered, adjudged and decreed that appellant Terrance J. Pitts pay all costs occasioned by this appeal, for which let execution issue.

It is further ordered that this decision be certified below for observance.

o 0 o NO. 07-99-0222-CV
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL A
MARCH 15,2000

TERRANCE J. PITTS, APPELLANT
V.
DALLAS COUNTY BAIL BOND BOARD, APPELLEE

FROM THE 116TH DISTRICT COURT OF DALLAS COUNTY;
NO. 96-12507-F; HONORABLE MARTIN E. RICHTER, JUDGE

Before BOYD, C.J., and REAVIS and JOHNSON, JJ.

This appeal involves a challenge to an award of attorneys fees pursuant to the Civil Rights Attorneys' Fees Award Act (42 U.S.C. § 1988) arising out of claims made against the Dallas County Bail Bond Board under Title 42, Section 1983 of the United States Code. Appellant Terrance J. Pitts (Pitts), presents five points of asserted error challenging the adequacy of the trial court award. Finding no reversible error in the trial court's judgment, we affirm it.

The action from which this appeal is brought was severed from a suit which originated between Eddie Dees and the Dallas County Bail Bond Board (the Board). Pitts intervened asserting claims against the Board under Title 42, Section 1983 of the United

States Code, for alleged deprivation of his civil rights, including his right to due process and seeking injunctive relief and attorney's fees under Title 42, Section 1988. As a result of that suit, the trial court rendered judgment in August 1993, awarding Pitts $570,123.81 in actual damages, ordering the Board to issue him a bail bondsman's employee ID card, and making certain declarations concerning the legality of business practices of Pitts. The judgment also awarded the Board $570,123.81 for forfeiture debts Pitts owed to the Board and offset Pitts's recovery against that of the Board. That judgment also severed Pitts's claim for attorney's fees under 42 U.S.C. § 1988.

Pitts's severed claim for attorney's fees was tried to the court February 8, 1999. He presented the testimony of his attorney, Carolyn Price, that she expended 1098 hours representing Pitts in the civil rights action and that a reasonable hourly rate for her services was $175. The Board presented evidence that 125 hours was a reasonable amount of time to work on the case and a reasonable hourly rate for a person of Price's experience was between $100 and $135. The trial court rendered judgment March 5, 1999, awarding Pitts $30,000 in attorney's fees incurred in prosecuting his Section 1983 suit. The judgment also awarded $5,000 for an appeal to the Court of Appeals, $2,500 in the event a petition for discretionary review was filed, and an additional $1,500 in the event the petition was granted. Pitts requested findings of fact and conclusions of law on March 10. He then filed a motion for new trial and notice of past due findings of fact and conclusions of

law on April 5. On April 8, the trial court signed findings of fact and conclusions of law proposed by the Board. Pitts now challenges the trial court's award of attorney's fees in five points of asserted error.

Pitts's first assignment of error broadly alleges the trial court failed to analyze his attorney's fee application in accordance with applicable law. He presents three arguments in support of this point. The first argument challenges the legal and factual sufficiency of the evidence supporting certain findings of fact and errors in the court's conclusions of law. The second assigns error to the court's failure to make particular findings, and the third argument is a challenge to the trial court's failure to award attorney's fees and other costs to Pitts incurred in the Section 1988 action.

Findings of fact entered in a case tried to the bench have the same force and dignity as a jury's answers to jury questions. *In re P.R.*, 994 S.W.2d 411, 415 (Tex.App.--Fort Worth 1999, pet. dism'd w.o.j.). A trial court's findings of fact are reviewable for legal and factual sufficiency by the same standards applied in reviewing the sufficiency of the evidence supporting a jury's finding. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). In reviewing a no-evidence point, we consider only the evidence favorable to the decision of the trier of fact and disregard all evidence and inferences to the contary. *Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990). If there is more than a scintilla of evidence to support the finding, the no-evidence challenge must fail. *Id.* In considering a factual sufficiency point, we

review all the evidence and reverse only if the challenged finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Pool v. Ford Motor Co.*, 715 S. W.2d 629, 63 5 (Tex. 1986). We are not so bound by the trial court's conclusions of law, and review those conclusions de novo in order to determine their correctness. *Mercer v. Bludworth*, 715 S.W.2d 693, 697 (Tex.App.-- Houston [1st Dist.] 1986, writ ref d n.r.e.), *reversed on other grounds, Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 894 (Tex. 1991).

The parties agree that the determination of attorney's fees in a case of this type must be made in accordance with the 12 factors set out by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). They are: 1) the time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill required to perform the legal service properly; 4) the preclusion of other employment due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; IO) the undesirability of the case; I 1) the nature and length of the professional relationship with the client; and 12) awards in similar cases.

The trial court's findings of fact were specifically directed to these factors. Addressing each factor in turn, those findings were: 1) The time and labor required: The trial court found Pitts's attorney Price did not keep contemporaneous time

records while working on the Section 1983 case but reconstructed those records about December 1995, almost two and one half years after the judgment in that case. 2) The novelty and difficulty of the questions involved: The court found the issue involved the right of an employee to a bail bond identification card. It did not characterize that issue as novel or difficult. 3) The skill required to performed the legal service properly: The court found Price had handled one other Section 1983 case, pro se. 4) The preclusion of other employment due to acceptance of the case: Price was corporate counsel for BailAmerica from 1990 to 1993 and had not 'identified any other work she had refused due to her representation of Pitts. 5) The customary fee: The court's finding only noted that Price sought $175 per hour, although she had never billed this rate to any client. 6) Whether the fee is fixed or contingent: The court found the fee was fixed in that Pnce was a full time employee "for Pitts' company BailAmerica" and that she had no written fee agreement with Pitts. 7) Time limitations imposed by the client or circumstances: The court found there were no time limitations. 8) The amount involved and the results obtained: The court found Pitts was the prevailing party in the Section 1983 lawsuit. 9) The experience, reputation, and ability of the attorneys was not separately addressed in the findings of fact, but is arguably covered by the court's finding that Price had only prosecuted one other Section 1983 claim. 10) The undesirability of the case: The court found there was no evidence that the case was undesireable. 11) The nature and length of the professional relationship

with the client: The court found Price was an employee of Pitts for almost nine years and had been corporate counsel at the rate of $2,500 per month. 12) Awards in similar cases: There was no evidence of awards in similar cases.

The specific findings of fact and conclusions of law challenged by Pitts as incorrect are that: 1) "plaintiff" was a solo practitioner when he actually worked for a bail bonding company named BailAmerica; 2) the Section 1983 action was "by" Pitts's attorney Price, when she was not a party to the Section 1983 suit or the severed claim for attorney's fees; 3) an award of $30,000 "to Price" for attorney's fees was reasonable, when the award of attorney's fees was actually to Pitts and not directly to Price; 4) the findings misstated the prior business relationship between Pitts, Price, and BailAmerica; and 5) the characterization of BailAmerica as "Pitts'" company was not supported by the record. Pitts concludes that the "nature of the errors show that the trial court did not read the findings prior to signing them, did not know the facts of the underlying case, or did not know the law applicable to § 1988 fee applications."

Pitts's conclusion notwithstanding, his brief fails to explain how any of these factual findings caused error in the trial court's judgment. It is fundamental that a judgment may not be reversed on appeal unless the error probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to this court. Tex. R. Civ. App.44.1(a). Assuming, without deciding, that Pitts is correct and the challenged statements are not supported by legally or factually

sufficient evidence, he has failed to show the errors probably resulted in an improper judgment or prevented presentation of this appeal.

Pitts's second argument in support of his first point is that the trial court erred in failing to state a specific number of hours and the hourly rate for which compensation was awarded. In that argument, Pitts cites *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990). *Von Clark* does not support the inflexible rule urged by Pitts. *Von Clark* recited the appropriate process for determining an award of attorney's fees. That process involves the trial court " 1) ascertain[ing] the nature and extent of the services supplied by the attorney, 2) determine the value of the services according to the customary fee and quality of the legal work," and 3) adjust the fee determined in the first two steps, based on the other factors set out in *Johnson*. *Von Clark*, 916 F.2d .at 258. The "nature and extent of the services" is typically expressed in terms of the number of hours worked and the "value of the services" as an hourly rate. Opinions discussing this issue often refer to the product of multiplying the number of hours worked by the appropriate hourly rate as the "lodestar." *See, e.g., Von Clark*, 916 F.2d. at 258.

In explication of this process the court wrote, "to avoid the risk of remand the district court should explain with a reasonable degree of specificity the findings and reasons upon which the award is based,' including an indication of how the *Johnson* factors were applied." *Von Clark*, 916 F.2d at 258 (quoting *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1987)). After commenting that the trial court

did not follow a rigid step-by-step analysis of the *Johnson* factors, the *Von Clark* court affirmed the trial court's judgment. 916 F.2d at 260. It is clear from *Von Clark, Johnson, and Copper Liquor* that the trial court must make some determination of the extent of the services and the value of those services. However, they do not establish Pitts's conclusion that those determinations must be expressed empirically in the court's findings of fact. The fact that the fees awarded were within the range supported by the evidence leads us to the conclusion that the trial court did not abuse its discretion.

Pitts's third argument in support of his first point assigns error to the trial court's failure to award costs to him as "a prevailing party" in the Section 1988 suit. Because the record does not directly show that Pitts's petition sought recovery of attorney's fees and costs incurred in prosecuting the Section 1988 suit, addressing this point requires a brief discussion of the state of the record. Pitts's original designation of the record sought inclusion of "the entire contents of the court's file" in both the Section 1983 action and the Section 1988 action. The district clerk apparently found this designation unacceptable, thus leading to a second designation filed July 29, 1999, seeking inclusion of 32 items from the Section 1983 action, 26 items from the Section 1988 action, and "any other items required by law to be included." The pleadings were not specifically listed for inclusion in the clerk's record and were not included. Rule 34.5 of the Rules of Appellate Procedure provides that the record *must* include copies of the live pleadings, in addition to the items designated by the parties, *unless* the parties

designate the record by agreement pursuant to Rule 34.2. Rule 34.2 provides the parties may agree on the contents of the appellate record by written stipulation filed with the trial court clerk. The resulting record will be presumed to contain all evidence and filings relevant to the appeal. Tex. R. App. P. 34.2.

Here, the parties filed a document entitled "Agreed Stipulation Regarding Record." However, this document was filed with this court on August 2, 1999, rather than with the trial clerk as required by Rule 34.2. This document lists 11 pages of items the parties have agreed are "unnecessary" to the resolution of this appeal. Because agreements between the parties should be given effect whenever possible, *Johnson v. Swain*, 787 S.W.2d 36, 38 (Tex. 1989), we treat the parties' stipulation as to the record as effective in spite of the filing defect. Consequently, we presume Pitts's petition would support an award of attorney's fees and costs in the Section 1988 action. See Tex. R. Civ. P. 301 (requiring judgment to conform to, *inter alia*, the pleadings). Pitts did object to the court's failure to award attorney's fees and costs in a motion for new trial filed in the Section 1988 action.

It is clear from the wording of the trial court's judgment in the Section 1988 case that the award of $30,000 was 'for prosecution of his claims in *Pitts v. Dallas County Bail Bond Board*, trial court No. 90-10765-F" (the Section 1983 action) and the appeal of that cause. None of the trial court's findings of fact or conclusions of law addressed Pitts's claim for attorney's fees and costs in the Section 1988 action. Pitts places great emphasis on the fact that the Board

did not contest the evidence concerning fees incurred in prosecuting the Section 1988 claim; however, an opposing party's failure to challenge an award of fees and other costs does not establish a party's right to a recovery of that type. It is Pitts's burden to show the trial court was obligated by the law and the facts to award such costs. This he has failed to do.

Our analysis begins with the rule that a court may not award attorney's fees and costs without specific statutory authority. *El Paso Elec. Co. v. Texas Dept. of Ins.*, 937 S.W.2d 432, 443 (Tex. 1996). Federal law also requires a party seeking attorney's fees to specify "the statute, rule, or other grounds" showing their entitlement to attorney's fees. *See* Fed. R. Civ. P. 54(b). Pitts's claim may be based on the belief that Section 1988 itself provides the necessary authority. The plain reading of the statute does not compel that result. Section 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, [ ] 20 U.S.C. 1681 *et seq.* /]42 U.S.C. 2000bb et *seq.* / 1 42 U.S.C. 2000d *et seq.*, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs....

42 U.S.C. 1988. The omission of Section 1988 from the list of statutes for which attorney's fees may be recovered suggests that this statute does not

abrogate the general rule. Pitts cites several cases[1] he argues show his entitlement to recover attorney's fees and other costs in the Section 1988 action. None of these cases, however, concerned the issue before us. Most involved a civil rights plaintiff s right to recover attorney's fees incurred while prosecuting their civil rights claim, not fees incurred in a proceeding under Section 1988. Pitts has failed to show the trial court erred in not awarding attorney's fees and other costs incurred in the Section 1988 action.

In Pitts's second and third points, he alleges the trial court erred by failing to determine the reasonable number of hours (point 2) and the reasonable market rate for the attorney's services (point 3). Pitts's argument in support of his second point contains an extensive discussion of the services performed by his attorney and the adequacy of the attorney's documentation of the hours expended. He challenges the trial court's finding that Price's time records were not created contemporaneously when the services were rendered and cites a footnote in *Webb v. Board of Education of Dyer Co.*, 471 U.S. 234,

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1 Pitts cites: *Flight Attendants v. Zipes*, 491 U.S. 754, 758, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989); *Cunningham v. City of McKeesport* 807 F.2d 49 (3rd Cir. 1986); *Cruz v. Hauck*, 762 F.2d 1230, 1233 (5th Cir. 1985); *Jordan v. Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982); *Williams v. Miller*, 620 F.2d 199 (8th Cir. 1980).

238 n.6 , 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985), for the proposition that the use of reconstructed records are "not prohibited." That discussion is not relevant to the subject of Pitts's point, which is whether the trial court erred in failing to determine a specific number of hours that was reasonable.

The record contains conflicting evidence the trial court could have considered in determining the nature and extent of the services performed by Price. First, the record reflects a significant dispute over the reliability of Price's time records. Although she admitted they were not assembled into a bill until 1995, Price testified that she had some form of contemporaneous documentation supporting about 85 percent of the time claimed. The Board challenged the reliability of these records. As the finder of fact, it was within the trial court's prerogative to determine the reliability of this evidence. *Medlin v. Medlin,* 830 S.W.2d 353, 354-55 (Tex.App.--Amarillo 1992, writ denied); *see also LULAC v. Roscoe ISD,* 119 F.3d 1228, 1233 (5th Cir. 1997) (holding court may reduce or eliminate hours for which documentation is vague or incomplete). The trial court also found some of the work performed was clerical, which was not entitled to compensation at the rate for an attorney. Moreover, the Board presented testimony that a reasonable number of hours to spend on an action of this type was 125. Dividing the total award by the range of hourly rates supported by the evidence ($100 - $175) leads to the conclusion that the trial court has determined the number of hours reasonably expended was between 171 and 300. This entire

range is within the range supported by the evidence. Moreover, the trial court's findings of fact specifically addressed, however briefly, the 12 factors discussed in *Johnson*. The trial court's failure to expressly state the number of hours it found reasonably necessary does not establish that no such determination was made. We overrule Pitts's second point.

Pitts's third point assigns error to the trial court's "fail[ure] to determine a reasonable market rate." His argument in support of this point contains an extensive discussion of the evidence concerning the reasonableness of the hourly rate. However, as with his second point, these arguments do not support his point of error. Pitts has not shown that the trial court failed to determine the applicable hourly rate for Price's services, only that it did not express that determination. As mentioned previously, the fees awarded are consistent with a determination by the trial court of a reasonable hourly rate for Price's services within the range supported by the evidence ($100/hr - $175/hr). Pitts has failed to establish that the trial court did not determine the reasonable market rate for the services performed or that the failure to express the rate determined was error. We overrule his third point of error.

In his fourth Point, Pitts advances a general challenge to the amount of attorney's fees awarded. Citing Justice Rehnquist's dissenting opinion in *Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2688, 91 L.Ed.2d 466 (1986), that the most critical factor in the determination of fee awards is the success obtained, Pitts places great emphasis on that portion of the

judgment in the Section 1983 action awarding him "more than half a million dollars." His argument then recites that Pitts obtained $519 for each hour Price worked on the case and describes his request for an additional $191,000 in attorney's fees as "roughly 33%" of the actual damages awarded to Pitts."

Nowhere in Pitts's argument in support of this point does he mention the fact that the judgment in his favor was entirely offset, to the penny, by a judgment in favor of the Board. It is clear from the record that the trial court determined an appropriate sanction for the Board's conduct in denying Pitts's license was to wipe out Pitts's debts to the Board. This record suggests there was little to no evidence of economic damages to Pitts. It also supports the conclusion that the Board's claims against Pitts had significantly less value than $570,000 because Pitts's assets were insufficient to pay a judgment of that amount. We find these facts significant in weighing the success obtained by Pitts. While it is clear that Pitts obtained a benefit from Price's representation, we must also consider the entire judgment in context. So viewed, we cannot say the trial court's award was so against the weight of the evidence as to amount to an abuse of discretion. We overrule Pitts's fourth point.

Pitts's fifth point challenges the adequacy of the trial court's award of attorney's fees for appeal of the Section 1983 action. The three-sentence argument in support of this point is that it was error for the trial court to award less than the amount stated in the uncontroverted testimony of Pitts's expert Ruth Kollman. This expert testified that a

reasonable fee for prosecuting or defending an appeal to the court of appeals would be $20,000, $ 10,000 for preparing or responding to a petition for review in the Texas Supreme Court and an additional $5,000 if the petition were granted.

The record does not support Pitts's assertion that his expert's testimony concerning attorney's fees on appeal was uncontroverted. The record also contains the testimony of Marc Richman on the issue of attorney's fees. Richman testified that 50 hours would be a reasonable time to spend on an appeal of the Section 1983 case. This testimony, together with Richman's testimony that a reasonable hourly rate for Price's services would range from $100 to $135 per hour, supports the award of $5,000 for appeal to this court, $2,500 in the event a petition for review is filed in the Texas Supreme Court and an additional $1,500 if such petition is granted. We overrule Pitts's fifth point.

Finding no reversible error in the judgment of the court below, we affirm that judgment.

John T. Boyd
Chief Justice

Publish.

EXHIBIT C

Terrance J. Pitts,	§	From the 116th
Appellant		District Court
	§	of Dallas County
v. No. 07-99-0222-CV	§	May 8, 2000
Dallas County Bail	§	Opinion by Chief
Bond Board		Justice Boyd
Appellee		

JUDGMENT

The Court's judgment rendered March 15, 2000 in this cause is withdrawn and, in lieu thereof, the following judgment is rendered:

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is therefore ordered, adjudged and decreed that the portion of the trial court's judgment denying appellant recovery of costs and denying recovery of attorney's fees is reversed and remanded to to the trial court for a determination of those attorney's fees. The remainder of the judgment of the trial court is affirmed.

It is further ordered, adjudged and decreed that appellant Terrance J. Pitts pay one-half of all costs occasioned by this appeal, and appellee Dallas County Bail Bond Board pay one-half of all costs occasioned by this appeal, for which let execution issue.

It is further ordered that this decision be certified below for observance.

o 0 o

NO. 07-99-0222-CV

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL A

MAY 8, 2000

TERRANCE J. PITTS, APPELLANT

V.

DALLAS COUNTY BAIL BOND BOARD, APPELLEE

FROM THE 116TH DISTRICT COURT OF DALLAS COUNTY;

NO. 96-12507-F; HONORABLE MARTIN E. RICHTER, JUDGE

Before BOYD, C.J., and REAVIS and JOHNSON, JJ.

ON MOTION FOR REHEARI NG

Appellant Terrance J. Pitts moves for rehearing challenging our original disposition in five points of error. These points assign error to 1) our failure to award him costs, 2) affirming the denial of attorney's fees in his section 1988 suit, 3) holding that the trial court need not state a specific number of hours and hourly rate on which an award of attorney's fees is based, 4) refusing to find error in the trial court's judgment, and 5) failing to address his arguments on "reasonableness." We sustain Pitts's first two points and overrule the remaining points.

Pitts's first point assigns error to our failure to award him costs in the section 1988 action. He now

cites Rule 131 of the Rules of Civil Procedure arguing that an award of costs is mandatory to him as the "successful party" in the section 1988 suit. We agree that Rule 131 is applicable, but disagree with Pitts's position on the scope of costs.

In support of his claim for costs, Pitts's original brief cited an affidavit of his attorney, which included a list of "costs" for which he sought recovery. This list, which totals $2,163.80, includes items such as postage, parking, and photocopy expenses. Costs, within the meaning of Rules 125 through 149 of the Rules of Civil Procedure, are those items in the clerk's bill of costs. In response to a request for an award of costs, the court's role is to determine which party or parties is to bear the costs of court, not to adjudicate the correctness of specific items. *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 937 S.W.2d 60, 87 (Tex.App.--Houston [14th Dist.] 1996), *modified in Operation Rescue*, 975 S.W.2d 546 (Tex. 1998); *Reaugh v. McCollum Exploration* Co., 140 Tex. 322, 167 S.W.2d 727, 728 (1943). The inclusion of specific items taxed as costs is a ministerial duty performed by the clerk. *Reaugh*, 167 S.W.2d at 728. Correction of errors in specific items of costs is sought by a motion to retax costs. Id.

Although the allocation of costs is a matter for the trial court's discretion, and cannot be overturned on appeal unless the trial court abused its discretion, an abuse of discretion is shown when costs are not allocated according to the provisions of Rule 131, unless it makes a finding of good cause. *University of Houston -Clear Lake v. Marsh*, 981 S.W.2d 912, 914

(Tex.App.-Houston [1st Dist.] 1998, no pet.). Because Pitts was successful in his claim for attorney's fees incurred in bringing the section 1983 suit, and the trial court did not make any finding relating to good cause, he was entitled to recover court costs under Rule 131. We sustain his first point on rehearing and modify the judgment of the trial court to award costs to him, as determined by the trial courts bill of costs.

In his second point, Pitts argues we erred in failing to reverse the trial courts denial of attorney's fees in the section 1988 suit. He contends we did so without requiring evidence from the Board, without citing any authority and without addressing *Cruz v. Hauck*, 762 F.2d 1230 (5th Cir. 1985). An examination of our original opinion will reveal that we accepted Pitts's uncontested evidence of attorney's fees in the 1988 action as true, but found he had failed to show the law required the trial court to award those fees. We specifically found each of the cases cited by Pitts, listed in footnote I of that opinion, distinguishable.

In each case cited by Pitts, the Plaintiffs sought to recover attorney's fees expended to establish their right to attorney's fees in prosecuting a civil rights claim enumerated by section 1988. That is the same recovery Pitts seeks here. The distinction was that each of those cases, and authority they relied upon, like *Newman v. Piggy Park Enterprizes, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), and *Kirchberg v. Feenstra*, 708 F.2d 991 (5th Cir. 1983), was that the request to establish attorney's fees was presented in the underlying civil rights claim, not as a separate cause of action. In our original opinion, we examined the plain language of section 1988 and

found that it did not authorize an award of attorney's fees in a suit brought independently under that section.

Although Pitts's claim for attorney's fees was tried separately, the record shows that the claim was originally asserted in the section 1983 suit and severed by the trial court. It is not apparent from the record whether one of the parties or the trial court sought the severance. Because the claim for attorney's fees was asserted in the original section 1983 suit, and subsequently severed, the case is more similar to *Cruz, Newman,* and other cases relied on by Pitts than an action filed solely to vindicate the rights granted by section 1988.

On rehearing, Pitts cites additional cases for the proposition that the failure to award attorney's fees for time spent in obtaining or defending a fee award is error. They are *Johnson v. State of Mississippi,* 606 F.2d 635 (5th Cir. 1979); *Ustrak v. Fairman,* 851 F.2d 983 (7th Cir. 1988); and *Clark v. City of Los Angeles,* 803 F.2d 987 (9th Cir. 1986). Pitts suggests that our application of section 1988 is inconsistent with 'every other court" that has considered the issue. Citing *Clark,* 803 F.2d at 992. Clark relied on the bankruptcy case of *In re Nucorp Energy, Inc.,* 764 F2d 655 (9th Cir. 1985), which relied, in turn, on several federal district and circuit court opinions applying section 1988. These cases do not discuss the distinction relied on in our original disposition. They do show federal courts' construction of section 1988 has placed greater emphasis on giving effect to its underlying purpose than to strict adherence to the language chosen by

congress. This is clear from the failure of these cases to explain why the word "may" in section 1988 is not given its permissive, rather than mandatory, construction.

Although we are construing a federal statute, we are not bound by the decisions of lower federal courts. *Southwestern Greyhound Lines, Inc. v. Railroad Commission of Texas,* 128 Tex. 560, 99 S.W.2d 263, 268 (1936); *Woodard v. Texas Dept of Human Resources,* 573 S.W.2d 596, 598 (Tex.Civ.App.-Amarillo 1978, writ ref d n.r.e.); *Barstow v. State* , 742 S.W.2d 495, 510 (Tex. App.-Austin 1987, writ denied). We are obligated to follow decisions of the United States Supreme Court on questions of federal law. *Southwest Greyhound,* 99 S.W.2d at 268.

When construing a statute, Texas courts have long adhered to the distinction between permissive terms such as "may" and mandatory terms such as "shall." See, *e.g., Inwood Homeowners Assn, Inc. v. Meier,* 625 S.W.2d 742,743 (Tex.App.--Houston 1981, no writ). See also Tex. Govt. Code Ann. § 311.016 (Vernon 1998). We are not free to rewrite the statutes created by the legislative branch of government. *Public Utility Com'n of Texas v. Cofer,* 754 S.W.2d 121, 124 (Tex. 1988).

Pitts has not cited, and we have not found, an opinion of the United States Supreme Court directly addressing the right to attorney's fees under section 1988. That court's opinion in *Newman,* concerning a plaintiff s fight to attorney's fees under 42 U.S.C. 2000a-3(b) is helpful. That statute was very similar to the language of section 1988 in that it provided a

court "may" award attorney's fees and committed such award to the discretion of the trial court. *Id.* The court held that a party should ordinarily recover such fees unless there are special circumstances to deny the award. *Id.* at 402. Several of the cases from lower federal courts have cited *Newman* in construing section 1988. Because of the similarity in language between that construed in *Newman* and section 1988, we agree that the cases cited by Pitts are applicable. We also agree that the record does not show any special circumstances supporting the denial. We sustain Pitts's second point.

In his third point, Pitts challenges our holding that the trial court did not reversibly err in failing to state a specific number of hours and hourly rate on which the award of attorney's fees was based. He cites *Cheme Industries, Inc. v. Magallanes,* 763 S.W.2d 768 (Tex. 1989), for the proposition that the trial court "was required to make these findings." *Cheme* actually held that a trial court's refusal to make any findings of fact or conclusions of law after proper request is error. *Id.* at 772. Here, the trial court filed findings of fact and conclusions of law, just not the ones Pitts wanted. We reject Pitts's claim that we improperly found by implication the 'elements' of the reasonable hours and hourly rate. The hours reasonably expended and the attorney's hourly rate are not elements of a claim or defense, they are simply factors the trial court must consider in determining a "reasonable attorney's fee." 42 U.S.C. § 1988. We overrule Pitts's third point.

Pitts's fourth point merely urges we failed to properly consider his challenges to the trial court's

findings of fact and conclusions of law. We disagree and overrule his fourth point.

Pitts's final point contends we erred by failing to address his "arguments on reasonableness."He argues that this court failed to address the reasonableness of the fees awarded in light of the result obtained. According to Pitts, we misrepresented the extent of his success in the section 1983 suit by stating the trial court's judgment in that action also awarded the Board $570,123.81 and offset that award with an award in favor of Pitts. He now represents that the Board's judgment against him predated the judgment in the section 1983 suit. While we believe any confusion arose from Pitts's failure to even acknowledge the existence of the Board's judgment or the offset in his original brief, it is of no consequence whether the Board's judgment was obtained in the section 1983 suit or was preexisting. The record shows the Board's judgment was worth significantly less than its face value because Pitts did not have sufficient assets to satisfy it. It is clear the trial court chose that specific amount for the purpose of offsetting the Board's judgment and not to compensate Pitts for actual damages. While this judgment was of significant value to Pitts, his contention that it had the same value as a money judgment for $570,000, free of any offset, is disingenuous. We overrule Pitts's fifth point on rehearing.

In conformity with our disposition of his first two points, we grant appellant's motion for rehearing to the extent that we reverse that portion of the trial court's judgment denying Pitts recovery of costs and

denying recovery for attorney's fees in establishing his right to attorney's fees under section 1988. We remand that portion to the trial court for a determination of those attorney's fees. The remainder of the trial court's judgment is affirmed.

John T. Boyd
Chief Justice

Publish.

EXHIBIT D

The State of Texas

JOHN T BOYD Seventh District of Texas PEGGYCULP
Chief Justice Potter County Courts Building Clerk
BRIAN QUINN 401 S. Filmore, Suite 2-A MAILING
Justice Amarillo, Texas 79101-2449 ADDRESS
DON H. REAVIS PO. Box 9540
Justice 79105-9540
PHIL JOHNSON (806) 342-2650
Justice FAX: (806) 342-2675

June 7, 2000

Ms. Carolyn Findley Price
Attorney at Law
417 Williams Street
Arlington TX 76010

Mr. John Clark Long, IV
Assistant District Attorney
41 1 Elm Street, 5th Floor
Administration Bldg.
Dallas TX 75202

Dear Counselors:

In Cause No. 07-99-0222-CV, styled TERRANCE J. PITTS V. DALLAS COUNTY BAIL BOND BOARD, from the 116th District Court of Dallas County, the Court this day overruled Appellant's Motion for Rehearing.

Very truly yours,

S/ Peggy Culp

Peggy Culp, Clerk

xc: Honorable Martin E. Richter, Judge
Honorable Pat McDowell, Judge
Mr. Jim Hamlin, Clerk

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EXHIBIT E

No. 96-12507-F

TERRANCE J. PITTS	§	IN THE DISTRICT COURT
Plaintiff	§	
	§	
vs.	§	116TH JUDICIAL DISTRICT
	§	
DALLAS COUNTY BAIL BOND BOARD	§	
Defendant	§	DALLAS COUNTY, TEXAS

FINAL JUDGEMENT

On the 9th day of February 1999, came on to be heard before this Court the above entitled and numbered cause. The parties answered and were before the Court. The parties agreed that this cause would be tried by the Court. The Court, after hearing the arguments of counsel and considering all the evidence on file with the Court and the oral testimony presented at the hearing finds that Plaintiff Terrance J. Pitts is the prevailing party in an action under 42 U.S.C. §1983 and is entitled to an award of reasonable attorney fees pursuant to 42 U.S.C. §1988. The Court renders judgment as follows:

It is hereby ORDERED, ADJUDGED, AND DECREED that Plaintiff Terrance J. Pitts have judgment against Defendant Dallas County Bail Bond Board in the amount of THIRTY THOUSAND DOLLARS and NO/100's ($30,000.00) as reasonable

attorney fees under 42 U.S.C. §1988 for prosecution of his claim in Pitts v. Dallas County Bail Bond Board, Trial Court No. 90-10765-F and its appeal, Dallas County Bail Bond Board v. Pitts,, No. 05-93-01880-CV.

The Court finds that the following are reasonable attorney fees for further prosecution or

Final Judgement - Page 1 of 2

defense of this case FIVE THOUSAND DOLLARS and NO/100's ($5000.00) in the event this case is appealed to the Court of Appeals; TWO THOUSAND FIVE HUNDRED DOLLARS AND NO/100's ($2500.00), if a petition for review is filed with the Texas Supreme Court; ONE THOUSAND FIVE HUNDRED DOLLARS AND NO/100's ($1500.00), if review is granted by the Texas Supreme Court. All appellate fees are conditional.

All relief not specifically granted herein is DENIED.

Signed this 5th day of March 1999

s/ Martin Richter

The Honorable Judge Richter

Approved as to form only:

s/ John C. Long *s/ Carolyn Findley Price*

JOHN VANCE *Bill Hill* CAROLYN FINDLEY PRICE
District Attorney, Texas Bar No. 07003700
Dallas County

JOHN CLARK LONG, IV
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ATTORNEY FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT

EXHIBIT F

CAUSE NO. 96-12507-F

TERRANCE J. PITTS,	§	**IN THE DISTRICT COURT**
Plaintiff	§	
	§	**DALLAS COUNTY,**
V	§	
	§	**TEXAS**
DALLAS COUNTY	§	
BAIL BOND BOARD	§	
Defendant	§	**116th JUDICIAL DISTRICT**

DEFENDANT'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Dallas County Bail Bond Board and files this its Proposed Findings of Fact and Conclusions of Law and would show as follows:

On this the 5th day of March 1999, the court rendered a final judgment in the above-styled case. The court makes the following Findings of Fact and Conclusions of Law.

Findings Of Fact

1. Plaintiff was represented in the underlying 42 U.S.C. 1983 cause of action (the "Lawsuit") by Carolyn Findley Price ("Price").

2. Price submitted 'lime records for attorneys fee that were purportedly business records made at or near the time or reasonably soon thereafter.

3. Price's records were drafted on or about December 1995. Price testified she did not routinely keep calendars or notations of the time and she did

not customarily bill for her time in the Lawsuit. Price testified she performed all clerical and secretarial duties herself.

4. The novelty and difficulty of the questions pertained to the right of an employee to have a bail bond identification card.

5. The skill requisite to perform legal services properly included another 1983 case by Price undertaken pro se.

6. The preclusion of other employment by Price due to acceptance of the case was minimal. Price testified she was corporate counsel for BailAmerica from 1990 to 1993. Price did not identify other work she refused.

7. The customary fee Price testified to was $175.00 an hour although she had never billed this amount before or since to any other client.

8. The fee is fixed in that Price was paid for her services as a full time attorney for Pitts' company, BailAmerica during her work on the case. She has never been paid the fee she billed and testified she had no written contract for a fee with Pitts.

9. There were no time limits imposed by the client or circumstances as Pitts was able to continue working during the pendency of the Lawsuit.

10. The amount involved and the results obtained included a determination that Pitts did not

owe for previous bail bond forfeitures. Pitts was the prevailing party in the Lawsuit although there was not a monetary award to him except for an award completely offset by a counterclaim.

11. There was no testimony of the undesirability of the case.

12. There was no testimony of awards in similar cases.

13. The nature and length of the professional relationship with the client is that Price has been an employee for almost nine (9) years for Pitts. Price has been corporate counsel at the rate of approximately $2500 per month.

DEFENDANT'S PROPOSED FINDINGS Of FACT AND CONCLUSIONS OF LAW - PAGE 2
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14. Price testified much of the bill was a reconstruction and an estimation of her time from reviewing documents.

15. Price testified the amount of time spent on the preparation and drafting of the appeal was not set out per day, per week or per task

CONCLUSIONS OF LAW

1. The fee applicant has the burden of proving the reasonableness of the number of hours expended on her prevailing claim. This burden does not shift to the opposing party merely because that party does not show that the hours are unreasonable or that it did not make specific objections to the hours claimed.

2. Absent a reliable record of the time expended on the prevailing claim, it is within the discretion of the district court to determine a reasonable number of hours that should have been expended in pursuing the claim.

3. The court should exclude all time that is inadequately documented.

Watkins v. Fordice, 7 F.3d 453, 457 (5th Cir.1993);

Alberti v. Klevenhagen, 896 F.2d 927, 930 (5th Cir. 1990).

4. The court should consider "hours reasonablely expended at a reasonable hourly rate."

Hensley v. Eckerhart, 461 U.S. 424 (1984).

5. Plaintiffs submitting fee requests are required to exercise "billing judgment: ... the usual practice of law firms in writing off unproductive, excessive, or redundant hours."

Alberti v. Klevenhagen, 896 F.2d 927, 930 (5th Cir. 1990).

6. The dollar value of clerical duties that could have been handled by non-lawyers is not enhanced simply because a lawyer does it.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 7127 (5th Cir. 1974).

7. The ***Johnson v. Georgia Highway*** criteria reflects a reasonable award of $30,000 to Price for her attorney's fee in the Lawsuit.

Signed this the 8th day of April, 1999.

S/ Martin Richter
Judge Presiding

APPROVED AS TO FORM:

s/John Long
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EXHIBIT G

CAUSE NO. 96-12507-F *271F168*

TERRANCE J. PITTS,	§	**IN THE DISTRICT**
	§	**COURT**
Plaintiff	§	
	§	**DALLAS COUNTY,**
V	§	
	§	**TEXAS**
DALLAS COUNTY	§	
BAIL BOND BOARD	§	
Defendant	§	**116th JUDICIAL**
		DISTRICT

ADDITIONAL FINDINGS OF

FACTS AND CONCLUSIONS OF LAW FILED

May 8 1999

JIM

HAMLIN

DIST.CLERK, DALLAS CO., TEXAS

S/ PE DEPUTY

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Dallas County Bail Bond Board and files this its Additional Findings of Fact and Conclusions of Law and would show as follows:

On this the 5th day of March 1999, the court rendered a final judgment in the above-styled case. The court makes the following Additional Findings of Fact and Conclusions of Law.

Additional Findings Of Fact

1. Plaintiff was a solo practitioner both in the underlying 42 U.S.C. 1983 cause of action (the "Lawsuit") by Carolyn Findley Price ("Price") and the current cause of actions.

2. Price testified she has not worked as an associate or partner in a law firm in Texas. As part of her regular practice, she does not typically bill by the hour.
3. The Lawsuit involved one Plaintiff and the action of the Defendant at a single meeting of the Bail Bond Board.
4. Price testified billing for the pretrial discovery was a reconstruction or estimation based on reviewing correspondence or pleadings after the fact.

ADDITIONAL FINDINGS Of FACT
AND CONCLUSIONS OF LAW - PAGE 1
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5. Marc Richman testified to extensive pretrial, trial and appellate experience in civil rights litigation. He was tendered as an expert in civil rights litigation. The Court accepted Mr. Richman as such an expert.
6. Mr. Richman testified that the Lawsuit involved straight forward facts from a short time period.
7. Mr. Richman testified that $175.00 an hour for work such as the Lawsuit would be a usual and customary fee for an attorney with substantial previous experience in civil rights litigation. Richman testified that Price's background in civil rights litigation did not appear to be substantial.
8. Mr. Richman testified a customary fee is what is typically charged by a lawyer for similar work with similar skill.
9. Mr. Richman testified that hearings were dropped, facts were stipulated and a trial on the merits was

obviated by a stipulation of facts in the Lawsuit.
10. Mr. Richman testified that several affirmative defenses that would have disposed of the Lawsuit were not effectively raised or argued. Therefore, the results of the case were possibly a product of omission by Dallas County rather than aggressive prosecution by Price.
11. Mr. Richman testified the hours necessary for the same work in a similar case would be $20,000 to $35,000.

Additional Conclusions of Law

1. Price has the burden to prove the reasonableness of the hours claimed.

ADDITIONAL FINDINGS Of FACT AND CONCLUSIONS OF LAW - PAGE 2
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2. The trial court may disregard Price's testimony or records if there is a showing that the hours expended are unreasonable.
3. The trial court properly disregarded Price's records as unreasonable and inadequately documented.
4. The trial court properly considered the expert testimony of Mr. Richman regarding hours reasonably expended at a reasonable hourly rate.
5. Price did not have reliable or reasonable records as to hours expended or that reasonably should have been expended.
6. Price did not have reliable records for what, if anything, would be a reasonable amount of attorney fees in the event of an appeal of the case.

Signed this the 6th day of May, 1999.

S/ Martin Richter
Judge Presiding

APPROVED AS TO FORM:
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DEFENDANT'S PROPOSED FINDINGS Of FACT AND CONCLUSIONS OF LAW - PAGE 3
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EXHIBIT H

Opening Argument at RR Vol.2-6 ln. 25, Vol.2-7 ln. 1-5:

"The standard for determining the amount of the fee under 1988 is a reasonable fee in light of the results achieved. It is determined by multiplying the reasonable number of hours spent on the case by the market rate in the community for similar services."

Proposed Findings at CR 164-165:

5. The Court finds that 921.04 attorney hours were spent in the prosecution of Pitts v. Dallas County Bail Bond Board, Trial Court No. 90-10765-F and its appeal, Dallas County Bail Bond Board v. Pitts, No. 05-93-01880-CV.

6. An hourly rate of $175.00 is within the range of the ususal and customary fees charged in the community for legal services similar to those rendered by Plaintiff Pitts' attorney during 1991 to 1999.

Request for Additional Findings at CR 206:

1. The reasonable number of hours spent on the lawsuit and the appeal was 171.43. All hours claimed by Pitts above this were unnecessary, because, although the hours were not redundant and were all interwoven with Pitts' §1983 cause of action, the lawsuit itself should have been brought under Tex. Rev. Civ. Stat. 2372p-3 ("The Bail Bond Licensing Act") instead of under 42 U.S.C. §1983.

2. The reasonable rate in the community for similar services is $175.00 per hour for all pertinent

time.

Motion for New Trial at CR 172-173.:

"The method by which the court calculates an attorneys' fees award under 42 U.S.C. § 1988 is well established. The court first calculates the "lodestar." *Watkins v. Fordice,* 7 F.3d 453, 457 (5th Cir. 1993). *Louisiana Power & Light Co. v. Kellstrom, 50* F.3d 319, 324 The lodestar is the number of hours reasonably expended multiplied by a reasonable hourly billing rate. *Hensley* at 434. The difficulty of establishing the merits of Plaintiff's claim should be reflected (either in more hours expended or in a higher hourly rate) in the lodestar. *Burlington* at 562.

Reasonable Hours

To begin, the court must first calculate the number of hours reasonably expended on the litigation. The calculation requires a determination of whether the total number of hours claimed were reasonable and whether specific hours claimed were reasonably expended. *Alberti v. Klevenhagen,* 896 F.2d 927, 933-34 (5th Cir.), *vacated in part on other grounds,* 903 F.2d 352 (5th Cir. 1990). The district court must eliminate excessive or duplicative time. *Watkins* at 457. The hours eliminated should be specified and the court should not undertake an "across the board" reduction, at this stage."

Motion for New Trial at CR 175-176.

"Reasonable Market Rate

The Court's initial determination of reasonable rates is also reviewed for clear error. *Louisiana Power & Light* , 50 F.3d at 324. The

reasonable hourly rate is based on the "prevailing market rates in the relevant community". *Blum v. Stenson,* 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984)."

Motion for New Trial at CR 182.

"The lodestar is presumed to reflect a reasonable attorneys fee award, but the court may adjust it upward or downward in exceptional cases. *Burlington* at 561-63. *See also Walker v. United States Dept of Hous. and Urban Dev.*, 99 F. 3d 761, 771-773 (5th Cir. 1996) (describing the limited circumstances in which an adjustment to the lodestar is appropriate). In its analysis of the *Johnson* factors, the Court must be careful not to "double count" those factors which went into calculation of the original loadstar figure. The court must give special weight to the results achieved. *Hensley*, 461 U.S. at 434. It should justify any downward adjustment it makes by specifying the fee application entries which it has reduced or disallowed."

EXHIBIT I

Appellant's Brief at p.xii:

"POINTS OF ERROR

I.

THE COURT FAILED TO ANALYZE PITTS' FEE APPLICATIONS IN ACCORDANCE WITH APPLICABLE LAW."

Appellant's Brief at p.4:

"SUMMARY OF THE ARGUMENT

I. The findings of fact and conclusions of law misstate the basic facts of the underlying case; they provide no explanation for the award and do not specify the rate or hours used. The award does not include a fee or costs for the collection case."

Appellant's Brief at pp.5-6:

"The method by which a trial court should analyze an application for attorney's fees under §1988 is well established. Once it is determined that a party has prevailed [footnote omitted], the court then calculates the "lodestar" (the number of hours reasonably expended multiplied by a reasonable hourly billing rate as determined by the relevant market). *Hensley v. Eckerhart,* 461 U.S. 424, 433-434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). There is a strong presumption that the lodestar is the reasonable attorney's fee. *City of Burlington v. Dauge*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) citing *Pennsylvania v. Delaware Valley Citizens' Council,* 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) (*"Delaware Valley I"*). Most, if not all, of the

factors cited in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19, (5th Cir. 1974) are subsumed in the lodestar analysis. *Delaware Valley I*, 478 U.S. at 566."

Appellant's Brief at p.13:

"Under *Hensley* and its progeny, a court must analyze the evidence surrounding the fee application, explain the reasons for the fee awarded, and not proceed in a summary fashion. *Hensley*, 461 U.S. at 437. *Cobb v. Miller*, 818 F.2d 1227, 1232 (5th Cir. 1987)."

Appellant's Brief at p.14:

"The second error is the failure to state the minimum required findings and to use proper legal analysis to explain the award. Cases interpreting §1988 require the trial court to specify the number of hours for which compensation is awarded, state the hourly rate to be used, and provide a clear explanation for the amount awarded. *Hensley*, 461 U.S. at 455. (BURGER, J., concurring in part, dissenting in part). The trial court did not do so; this is reversible error. *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990).

Pitts requested the findings specify both rate and hours and provide an explanation for the award. (CR 206-207). The refusal to do so, coupled with Conclusions 4 and 7, lead to an inference that appropriate §1988 fee analysis was not performed. Conclusion 4 states the court "should consider" the lodestar factors; Conclusion 7 states the *Johnson* "criteria reflects" the fee awarded. Together, these

conclusions show that the lodestar and the *Johnson* factors were given exactly the opposite weight to which they are each entitled under *Hensley*. Conclusions 4 and 7, together, misinterpret the law.

The failure to state the rate and hours utilized to calculate the lodestar, to give reasons for the fee awarded, and to properly analyze the fee applications is clear error."

Appellant's Brief at p.16-18:

"II.

THE COURT ERRED BY FAILING TO DETERMINE A REASONABLE NUMBER OF COMPENSABLE HOURS.

The first step in calculating the lodestar is determining the number of hours reasonably spent on the case. *Riverside v. Rivera*, 477 U.S. 561, 569, 106 S.Ct. 2688, 91 L.Ed.2d 466 (1986). Even if the plaintiff does not recover on all claims, he "may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Hensley*, 461 U.S. at 347 n. 11; *Riverside*, 477 U.S. at 572, 588, 593.; *Farrar v. Hobby*, 506 U.S. at 114 citing *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 793, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989).

The factors of novelty and difficulty of issues and the potential for protracted litigation should be reflected in the lodestar. "In most cases where the "legal" risks are high, and the case therefore novel and difficult, attorneys may be expected to spend a greater number of hours preparing and litigating the

case. Courts should consider this seriously in determining the "reasonable" number of hours to be incorporated in the lodestar and should be careful not to reduce unduly the number of hours in a novel and difficult case." *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 751,107 S.Ct. 3078, 97 L.Ed.2d 585 (1987)("*Delaware Valley II*") (BLACKMUN, J., dissenting). "When an attorney ultimately prevails in such a lawsuit, this success will primarily be attributable to his legal skills and experience, and to the hours of hard work he devoted to the case." *Delaware Valley I*, 478 U.S. at 726.

It was Pitts' burden to establish that the hours were reasonably expended. *Hensley*, 461 U.S. at 433. To be reasonable, the hours for which time is claimed must not be excessive, redundant, or unnecessary (i.e. inappropriate for compensation).[footnote omitted] *Id* at 434. The court should make an independent determination of the reasonableness of the hours requested. *Alberti*, 896 F.2d at 932. The fee opponent must submit evidence challenging the accuracy and reasonableness of the hours and the facts asserted by the fee applicant or waive its right to contest them. *Blum*, 465 U.S. at 892 n. 5.

The records must adequately describe the activity for which hours are claimed; they must disclose, generally, the subject matter on which time was spent. *Hensley*, 461 U.S. at 437 n.12; *Louisiana Power & Light*, 50 F.3d at 326-327. When a court determines that records do not adequately document the amount of time or specify the activity performed, it must explain the resulting reduction. *Id.* See also

Gilmere v. City of Atlanta, 931 F.2d 811, 815 (11th Cir. 1991); *Jacobs v. Mancuso*, 825 F.2d 559, 561-62 (1st Cir. 1991); *Gates v. Deukmejian*, 987 F.2d 1392, 1400-02 (9th Cir. 1993). When hours are spent on document production or review, the document itself can be evidence of the time claimed. *Alberti*, 896 F.2d at 931-932. The U.S. Supreme Court has not prohibited the use of reconstructed time records. *Webb v. Board of Educ.*, 471 U.S. 234, 238 n.6, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985)."

Appellant's Brief at p.44:

"The conclusions of law misconstrue, misstate and misinterpret the standards by which fee applications are reviewed. The trial court failed to specify the reasonable number of hours and the market rate; it stated no lodestar. It is not clear whether the award is in fact the lodestar or an amount based on an adjustment to the lodestar. No specific reasons are given for the reduction in the amount requested. The decision of the trial court should be reversed."

Appellant's Reply at pp.3-4:

"The Board admits that after the lodestar is determined the court "*adjust(s)* the compensation on the basis of *the other Johnson* [footnote omitted] *factors* which may be of significance *in the particular case*." (Board's Brief p. 5, citing *Newsboy v. Commissioners' Court of Jefferson County*, 798 F.3d 134 (5th Cir 1986), italics added). This admits three things: first, the initial calculation is of the lodestar; second, the remaining *Johnson* factors may adjust

the lodestar; and third, not all *Johnson* factors apply to every case.

The determination of the lodestar is the starting point in the analysis. This analysis subsumes most of the *Johnson* factors including: the novelty and complexity of the issues, the skill of the attorney, the experience of the attorney, and the quality of representation and the results obtained. *Pennsylvania v. Delaware Valley Citizens' Council,* 478 U.S. 546, 566, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) (*"Delaware Valley I"*) citing *Blum v. Stenson,* 465 U.S. 886, 898-900, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Logically, the time and labor required are also subsumed.

The findings do not state a lodestar and the court does not explain its 84% reduction of the requested fee. (CR p.202-205, 212-214; AP Tab 9 and 10). The Board asserts that Richman's testimony as to hours and rate can be imputed as the lodestar (Board's Brief p.14)[footnote omitted], that it can be"presumed" the court found a lack of billing judgement (Board's Brief p.10), and that there was an "ostensible" discount of Kollman's and Price's testimony (Board's Brief p.17). None of this is stated in the findings. A clear explanation for the amount of the award must be given. *Hensley v. Eckerhart,* 461 U.S. 424, 455, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (BURGER, J., concurring in part, dissenting in part). The failure to specify the reasons for the award is clear error. *Von Clark v. Butler,* 916 F.2d 255, 258 (5th Cir. 1990)."

Appellant's Reply at p. 21:

"As noted above, the Board selected case law which made three admissions: first, the lodestar is the initial calculation; second, the remaining *Johnson* factors may adjust the lodestar; and third, not all *Johnson* factors apply to every case. (Pitts' Reply p.2).

The *Johnson* factors which are not subsumed in the lodestar act only to adjust the lodestar. A party seeking reduction of the lodestar bears the burden of establishing that a reduction is justified. *Louisiana Power & Light Co.,* 50 F.3d at 338. The Board established the absence of the four *Johnson* factors under consideration; it did not show their absence justified a reduction in the lodestar."

Appellant's Reply at pp.21-22:

"Not all *Johnson* factors are applicable to every case. If, as here, there is no evidence of Price's customary fee, that other employment was precluded, that the case was especially undesirable or that awards in similar cases were much different, then the lodestar cannot be adjusted on the basis of those factors. The absence of a *Johnson* factor does not adjust the lodestar - upward or downward. The lodestar is, presumptively, the reasonable attorney's fee. *City of Burlington v. Dauge*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) citing *Delaware Valley I,* 478 U.S. at 565. When the Board states that the *Johnson* factors were "negated", it misconstrues the appropriate analytical framework. (Board's Brief p.7 f.24)."

Appellant's Reply at p. 23:

"Defendant's Proposed Findings of Fact and

Conclusions of Law" and "Additional Findings of Fact and Conclusions of Law" (AP Tab 9 and 10) are riddled with factual and legal errors, great and small. Virtually every finding and every conclusion contains at least one error. Even taken as a group, they do not state the minimum facts or provide the minimum explanations required under §1988."

Appellant's Motion for Rehearing at p. iv:

"REHEARING POINT OF ERROR III.

THE COURT OF APPEALS ERRED BY DETERMINING THAT LODESTAR HOURS AND RATE NEED NOT BE SPECIFIED."

Appellant's Motion for Rehearing at pp.4-6:

"REHEARING POINT OF ERROR III.

THE COURT OF APPEALS ERRED BY DETERMINING THAT LODESTAR HOURS AND RATE NEED NOT BE SPECIFIED.

This Court errs in the standard of review applicable to hours and rate. The initial determinations of the reasonable hours and rate comprising the lodestar are reviewed for clear error, not abuse of discretion. *Louisiana Power & Light Co. v. Kellstrom,* 50 F.3d 319, 329, *cert. denied,* 116 S.Ct. 173, 133 L.Ed.2d 113 (1995). Application of the factors in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and the ultimate fee award are examined for abuse of discretion.

Louisiana Power & Light Co. v. Kellstrom, 50 F.3d at 324, 329. Because they are subject to a different standard of review, the rate and hours must be stated separately from the *Johnson* factors and from the award itself. By holding that hours and rate need not be expressly stated, this Court eliminates Pitts' right to have the proper standard of review applied. This is error.

This Court errs when it states the parties "agree that the determination of attorney's fees...must be made in accordance with the 12 factors ... in ...*Johnson.*" Pitts did **NOT** agree that the *Johnson* factors control the analysis of an attorney's fee under §1988; he argued those factors are subsumed in the lodestar or used to adjust it. (Pitts' Brief pp.6,14; Pitts' Reply p.3.) The correct analysis of a fee application is an issue which was properly raised and is necessary to disposition of this appeal. This Court erred in not addressing this issue. Tex. R. App. Proc. 47.1.

Because it is the hours and rate that determine the presumptively reasonable lodestar fee, they are "controlling issues". *Taylor v. Texas DPS*, 754 S.W.2d 464, 468 (Tex. App.-- Ft. Worth 1988, writ denied.) (an issue is controlling if it supports the basis for judgement). Pitts requested findings on both hours and rate. (CR p.206-207.) The trial court was required to make these findings, but did not. *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex.1989). The failure to make these findings is considered a refusal. *Boy Scouts v. Responsive Terminal Systems, Inc*, 790 S.W.2d 738, 742 (Tex. App.-- Dallas 1990, writ denied.) When the trial court

refuses to make a finding on an element, that element cannot be supplied by implication. *Vickery v. Commission for Lawyer Discipline*, ___ S.W.3d ___, ___ (Tex. App.-- Houston [14th Dist.] 1999, n.p.h. (No. 14-97-00586-CV; 8-9-99). *See, generally,* Tex. R. Civ. Proc. 299. It was error for this Court to supply the hours and rate by implication.

This Court must presume the failure to make the requested findings on hours and rate is harmful unless the record affirmatively shows no harm was suffered. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996). Error is harmful if it prevents the party from properly presenting the appeal. Tex. R. App. Proc. 44.1(a). The issue is whether the circumstances of the particular case would require the appellant to guess at the basis for the trial court's decision. *Goggins v Leo,* 849 S.W.2d 373, 379 (Tex. App.-- Houston [14th Dist.] 1993, no writ). Because the trial court refused to state the hours and rate it used, this Court uses a range of possibilities for each in its opinion. Thus, even this Court is forced to "guess" as to the basis for the decision. This Court errs when it states Pitts failed to show that proper presentation of this appeal was prevented by the trial court's error.

Furthermore, because the trial court refused to state hours and rate, this Court does not notice that the Board conceded a minimum of 175 hours (RR Vol. 3-32 ln.16-21) or the internal inconsistencies in the Board's evidence on rate. (Compare RR Vol.3-15 ln.12-17 with RR Vol. 3-31 ln. 2-16 and RR Ex.8 p.3 and RR Vol. 3-35 ln.8-11 with RR Vol.3-31 ln.5-11 and RR Vol.3-35 ln.1-19.). Such fundamental defects would have been avoided, if hours and rate had been

specified. This Court is in error when it holds that the hours and rate actually used need not be specifically stated."

Appellant's First Further Motion for Rehearing at p. i:

"FIRST FURTHER REHEARING
POINT OF ERROR
I.
THE COURT OF APPEALS ERRED BY DETERMINING THAT THE LODESTAR, HOURS AND RATE NEED NOT BE SPECIFIED."

Appellant's First Further Motion for Rehearing at pp.1-4:

"FIRST FURTHER REHEARING
POINT OF ERROR
I.
THE COURT OF APPEALS ERRED BY DETERMINING THAT THE LODESTAR, HOURS AND RATE NEED NOT BE SPECIFIED.

This Court errs when it states "the hours reasonably expended and the attorney's hourly rate are not elements of a claim or defense, they are simply factors the trial court must consider in determining a 'reasonable attorney's fee'". (May 8th Opinion p.7).

First, the hours and rate are more than merely two factors the trial court must consider- they define the presumptively reasonable attorney's fee, the lodestar. *City of Burlington v. Dauge*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) citing *Pennsylvania v. Delaware Valley Citizens' Council,*

478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) ("*Delaware Valley I*"). This Court has chosen to rely on a Fifth Circuit Court of Appeals' case which is not binding on it - *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19, (5th Cir. 1974) - rather than discuss the U.S. Supreme Court precedents in this area. However, even if *Johnson* is presumed to be the appropriate analytical framework for this case (which Pitts disputes), a minimum of five of the 12 *Johnson* factors are subsumed in the two factors of hours and rate. *Delaware Valley I*, 478 U.S. at 566 citing *Blum v. Stenson*, 465 U.S. 886, 898-900, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). This Court errs by understating the importance of these two factors in light of the controlling U.S. Supreme Court analysis.

Second, Pitts has been unable to locate any 42 U.S.C. §1988 case in which the hours and rate used to determine the lodestar were <u>not</u> specified by the trial court. These two factors are so central to the amount awarded that no other court Pitts can locate has even theorized whether they might properly go unstated. This Court's authorization of their omission is a clear and surprising aberration from the U.S. Supreme Court's unexpressed, but implicit, requirement that these figures be specifically stated. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). ("The most useful starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonable hourly rate.") This Court errs when it deviates from the analytical requirements adopted, *sub silentio*, by the U.S.

Supreme Court.

Third, the applicant for an attorney's fee under 42 U.S.C. §1988 has the burden of proving not only entitlement to a fee award, but also the reasonable hours and the prevailing market rate which should be used to calculate that award. *Hensley*, 461 U.S. at 433. If the hours and rate are not elements of a claim or defense, then Pitts could have no burden of proof with regard to them. This Court errs when it holds they are not elements of a claim or defense.

Fourth, no court can perform an analysis of the reasonableness of hours and rate unless those hours and rate are known or can be determined from the lodestar. The trial court's findings here do not state hours, rate, or lodestar - only a final award. It is impossible for this Court to determine whether the figures for hours and rate used in the trial court's analysis were reasonable or not. It is error to hold that a trial court need not state either the hours and the rate or the lodestar in its findings after proper request."

EXHIBIT J

Petition for Review at p. viii:

"POINTS FOR REVIEW

I.

THE COURT OF APPEALS DISREGARDED BINDING U. S. SUPREME COURT PRECEDENT IN ANALYZING PITTS' §1988 FEE APPLICATION."

Petition for Review at p. 4:

"SUMMARY OF THE ARGUMENT

By failing to specify the hours or rate used to calculate the lodestar, by failing to state a lodestar amount, and by failing to provide a legally sufficient explanation of any adjustments to the lodestar, the trial court erred. The Court of Appeals ignored the U.S. Supreme Court's holdings on §1988 fee application analysis in affirming the trial court errors."

Petition for Review at p. 4:

"ARGUMENT

In 1986 in the case of *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 562-565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) ("*Delaware Valley I*") the U.S. Supreme Court stated:[footnote omitted - the 3 pages following quote *Delaware Valley I*]."

Petition for Review at p. 8-11:

"The U. S. Supreme Court has consistently relied on the lodestar approach to fee analysis since *Delaware Valley I* was published. *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 726-

727, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987) ("*Delaware Valley II*") (risk enhancement unnecessary under lodestar approach); *Blanchard v. Bergeron*, 489 U.S. 87, 96, 109 S.Ct. 939 (1989) (lodestar governs even if it results in a higher fee than private contingency fee agreement); *Missouri v. Jenkins*, 491 U.S. 274,283-284, 285-286, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (market determines hourly rate; delay enhancement permitted); *City of Burlington v. Dauge*, 505 U.S. 557, 562, 567, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (lodestar has become guiding light of fee-shifting jurisprudence, contingency enhancement impermissible).

The only significant modification to the lodestar approach after *Delaware Valley I* has been a re-emphasis on the importance of the degree of success in setting a reasonable attorney's fee. *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 790,793 109 S. Ct. 1486, 103 L.Ed.2d 866 (1989) (*Hensley v. Eckerhart* principles govern fee determination; degree of success is critical to fee size); *Farrar v. Hobby*, 506 U.S. 103, 109-112, 114-115, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (prevailing party status requirements, degree of success is primary factor in setting fee).

At every stage of the current litigation, Pitts has stressed that an hourly rate and a specific number of hours should be stated, so that the lodestar can be computed. (RR Vol.2-6 ln. 25, Vol.2-7 ln. 1-5 (opening argument); CR 164-165 (proposed findings); CR 206-207(request for additional findings); CR 172-173 (motion for new trial); Appellant's Brief pp.5-6, 14, 16-17, 44; Appellant's Reply pp. 3-4, 21, 23;

Appellant's Motion for Rehearing pp.4-6; Appellant's First Further Motion for Rehearing pp.1-4).

Likewise, Pitts has repeatedly urged that a clear explanation of the award should be given and stressed that "the results are what matter." *Hensley* , 461 U.S. at 432. (RR Vol.2-6 ln. 25, Vol.2-7 ln. 1-5 (opening argument); CR 164-165 (proposed findings); CR 206-207 (request for additional findings); CR 182, 195-196 (motion for new trial); Appellant's Brief pp.18, 48; Appellant's Reply pp. 2-4, 21-24; Appellant's Motion for Rehearing pp.10-11; Appellant's First Further Motion for Rehearing pp. 4-7.)

Both the district court and the Amarillo Court disregarded Pitts exhortations and relied solely on the 12 *Johnson* factors, rather than the blended lodestar analysis adopted by the U.S. Supreme Court. (Appendix Tab 1, Tab 2, Tab 3, Tab 4 pp.7, 12 and Tab 5 pp.7-8). Neither court saw any necessity to state the specific hours, rate, lodestar, or reasons for adjustments to the lodestar.

The U.S. Supreme Court mandates that the trial court specify the hours and rate used to calculate the lodestar and clearly explain any adjustments to the lodestar. The published opinions by the Seventh District Court of Appeals at Amarillo renouncing these requirements do not clearly fall into any of the categories listed under TRAP 56.1(a), although they may, perhaps, involve the construction of a statute under subsection 3. This case merits this Court's review, however, because the Seventh District Court of Appeals has violated two tenets fundamental to the workings of our courts - *stare decisis* and the "law

of the case." Both are essential to public confidence in the dispensing of justice and both have been severely undermined in this case by the courts below. The Court of Appeals' actions are especially egregious in this regard because they are published and particularly unjust because they attempt to re-write a final judgement. There has been no visible attempt to adhere to either principle in this case. The opinions issued by the Seventh District represent a subversion of the authority of the U.S. Supreme Court and an affront to our system of laws. This Court must not permit this deviation from binding precedent to go uncorrected."